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LAW AND LIBERTY.

In the May number of this REVIEW, Mr. E. V. Abbott reviews my work, *The Underlying Principles of Modern Legislation*.¹ The reviewer selects a particular passage, argues that the passage is fallacious, and then, with an expression of kind regret for which I am duly grateful, dismisses the whole work as vitiated by the fallacies which he alleges to exist in the passage which he cites. No author can be indifferent to a review of his work which appears in a periodical of the standing of the COLUMBIA LAW REVIEW, even if he thinks the review manifestly carries its own condemnation. I do not propose, however, to enter, in this article, upon any defence of my work. I desire only to discuss the particular passage which provokes Mr. Abbott's censure. That passage implies certain views as to the relation of law to liberty, which, despite the reviewer's arguments, I believe to be sound and of fundamental importance.

I think no apology is necessary for discussing the relation of law to liberty in a law review. The very bulk of our modern law compels the lawyer to press down his analysis of principles and rules to ultimate principles or elements; and in the course of this analysis he is constrained, both by the necessities of thought and the trend of judicial interpretation, to reflect upon the ends which law serves. Among these ends, none is more important than the liberty of the subject. It therefore behooves the lawyer to have clear ideas about liberty and its relations to legal regulations if he would understand the law which he professes to interpret and apply.

In one not unimportant respect, the reviewer and I seem to be in accord—the supreme importance of liberty as an element in social and individual well-being. We differ, however, in our views of the importance of legislative regulation as a means to the promotion of liberty. The difference may result in part from environment. The Labour Party in Australia has enjoyed a political ascendancy for several years; and it has achieved much in the way of useful reform. At the present moment, however, the rank and file are fast embracing Socialism as a political creed; and they are enforcing that creed upon their nominal leaders. The driving power behind this movement is not difficult to discover. The workers desire to become civil servants. I believe that the estab-

¹12 COLUMBIA LAW REVIEW 477.

lishment of a Socialistic State is inevitable unless opposing forces are able to formulate a sound and progressive policy of State regulation of private owned industry. The tendency towards combines and monopoly is too general and apparent to be ignored; and the methods of monopolistic control which most American writers think adequate to American conditions fall far short of what is necessary in a community which, from its comparative isolation, its high protective policy, its very limited market, and its relative lack of individual enterprise, offers unusual opportunities for the complete suppression of competition as a factor in the determination of prices. I doubt, to take an example, if any American Trust is so completely beyond the reach of actual or potential competition as our Colonial Sugar Refining Company. Such differences of conditions may account in part for a divergence in the mental attitude of Australian and American authors with respect to the relations of law to liberty.

The following passages from Mr. Abbott's review indicate the points at issue between us:

"His (the author's) reasons are thus stated at page 63 of his treatise: 'The liberty of an individual may be promoted by restrictions that the State imposes upon him in his own interests. In a later chapter, I shall refer to the *abuse* of this proposition. At present, I wish to illustrate the truth of the expressive paradox of Rousseau that a man may be *forced* to be free. In a humble sphere, the municipal legislation of our time affords some familiar examples. A by-law prescribes a penalty for boarding a tram which is already full. A would-be passenger, compelled to wait in the rain until the next car passes, may be tempted to complain that his liberty is thereby infringed. If, however, he will employ the interval in profitable reflection, he may learn to take a saner view of things. While the by-law prevents him from riding in one car, it ensures that he shall be free from being sat upon in the next car, and possibly from being deposited in the mud as the result of a break-down. More important still, the by-law serves to protect him from being exploited in the interests of a tramway company that would like to be allowed to run one car where it ought to run two. We have all heard of the suburban strap-hangers of New York; and we do not envy their freedom to pass a not inconsiderable portion of their lives in clinging to a strap.'

"We may be very certain that the strap-hangers of New York would hotly resent any such legislation in this city and that nothing that Professor Brown says would convince them that it would be either promotive of their liberties or conducive to their happiness. Indeed, what he says is not truly convincing on either point. It is no argument to urge that restricting a man's liberty may pro-

mote it; restriction might promote his comfort, but it could not promote his liberty, and the proposition is a mere contradiction in terms which only confuses the issue. It is no argument to point out that legislation will free the passenger from being sat upon and possibly from being deposited in the mud as the result of a break-down. We may readily admit that the passenger will receive *some* benefit from the restriction of his liberty,—few things are wholly evil,—but that is no answer to the objection that he has a proper-right to determine for himself whether he wants that benefit, or that he may lose other and more important benefits. It is no argument to say that the passenger will not be exploited in the interests of a company that would like to run only one car when it ought to run two; the remedy for that wrong is not to restrict the liberty of the passenger, but to punish the wrong-doing company. It is apparent, therefore, even from this brief summary, that the considerations which the learned author advances do not support his thesis.”²

No one, who is at all acquainted with the development of modern thought, will fail to concede Mr. Abbott’s valour in entering the lists in defence of a view of the nature of liberty which most writers of to-day have forsaken. The validity of that view may be tested by the following propositions which I take from Mr. Abbott’s text.

(1) *The restriction of a man’s liberty may promote his comfort, but it cannot promote his liberty.*

Australian Factory legislation prescribes certain conditions of labour, and establishes Wages Boards or Boards of Industrial Arbitration, for the purpose of fixing the rates of wage. Factory Inspectors are appointed to see that the provisions of the Acts are observed. The result is that the worker’s freedom of contract is impaired. He once had the choice of underselling his fellow-worker, either by working longer hours or by working for a sweating wage. The choice is now denied to him. To this extent is his liberty impaired. But if liberty mean anything more than “the desolate freedom of the wild ass”—and I assume that even Mr. Abbott would concede so much—his liberty as a whole is promoted. It is promoted in ways so numerous and so apparent as to call for no demonstration. High wages and reasonable hours of employment mean of course more comfort; but they also mean new opportunities for culture, recreation, or indulgence. I humbly submit that Mr. Abbott has not yet outgrown the naive view of liberty as a kind of natural substance from which every diminution means a net loss.

²*Ibid.* 478.

(2) *The remedy against a tramway company which would like to run one car when it ought to run two is to punish the wrong-doer.*

I make no objection to this proposition; but I cannot admit its relevancy. Whether legislation forbids persons from boarding a tram already full, or forbids the tramway company from carrying excess passengers, the effect upon the citizen's freedom of choice is taken away. He once was free to ride on an overcrowded tram. He is no longer free to do so. In one case, the law directly forbids the citizen from doing a certain thing; in the other case, the law virtually imposes upon the company the duty of passing a by-law which prohibits the citizen from doing the same thing. Whether the citizen is restricted by law or by by-law does not affect the fact that he is being restricted in his freedom of choice.

(3) *The strap-hangers of New York would hotly resent any such legislation as Professor Brown proposes.*

Here I must admit myself at a disadvantage. Though on several occasions I have witnessed the nightly exodus from Manhattan Island, my point of view has been that of the onlooker who, though he may see most of the game, is likely to fail in appreciating both the practical difficulties which may be involved in imposing new rules of the game, and the psychological compensations which console a competitor in a free fight. Now, for aught I know, your reviewer may be a strap-hanger himself! Even if he is not, his opportunities for observation and investigation must have been far greater than my own. I may be permitted, however, to point out that I did not propose any legislation to the citizens of New York. As the context shows, my object was to maintain that a legislative restriction on liberty *may* have the net effect of promoting liberty, not that it *must* have that effect under all conceivable conditions. When I last had the privilege of being in New York, I was told that there were physical impossibilities in the way of providing an adequate tram service from New York to Brooklyn. Assuming this to be the case, legislative restriction of the kind which I suggest might do more harm than good. It is better to hang to a strap than to dine off a cold joint. The alternative, however, does not present itself in this form in Australia. No physical impossibility exists; and when the State either forbids a company to carry excess passengers, or forbids persons to board a tram which is already full, the tramway company generally finds it both possible and expe-

dient to provide a more efficient service. If it failed to do so, the State would be constrained to discover other and more drastic forms of pressure. The Australian elector is a rather exacting sort of person. Less endowed with individual initiative than the citizen of the United States, he is quick, possibly too quick, to invoke the civic power in matters where that power appears to be capable of looking after his interests.

(4) *The passage cited from the author shows that his misconception of the nature of liberty has led him in at least one instance to precisely the wrong solution of a problem. Instead of advising a vigilant municipal government that would first throw safeguards about the granting of public franchises and would thereafter compel the grantees to fulfil the duties which their franchises create, he would limit the freedom of the people whom he is trying to protect.*

This criticism calls for several comments. (a) As I have just suggested, the "passage cited" was not written with the object of suggesting a solution to a particular problem, but as an illustration of a possibility that a man's liberty may be promoted by regulation which restricts in some ways his freedom of choice. Whether this very desirable result will follow in any particular case must depend upon conditions of time and place. I willingly concede to Mr. Abbott the right to extol the freedom of the New York strap-hanger to spend a not inconsiderable portion of his life in clinging to a strap, while I claim the right to say that the freedom is one which I do not envy.

(b) The reviewer's own solution of the problem appears to me curious. Certainly a municipal government should grant its franchises subject to appropriate conditions. But what is to be done with regard to franchises already granted? Are they to be exercised according to the sweet will of the recipient? In Australia, we do not think so. If a company enjoys a franchise, and abuses its privileges, our legislators think it no shame to step in and say: "There are limits to this sort of thing. We granted you a franchise; but we did not mean that you should do with it just as you like. We assumed that you would exercise it with some regard to public purposes; and we are going to take good care in the future that you shall so exercise it."

(c) Mr. Abbott appears to think there is a fundamental difference, even for the purposes of illustrating the relation of law to liberty, between granting a franchise subject to the observance of

certain conditions and imposing these conditions when the franchise is once granted. No doubt the former course is to be preferred. Everyone agrees that the State (or the Municipality) should look ahead when conceding new and important privileges. But with the State as with the individual, it is sometimes better to be late than never. Whether late or early does not alter the fact that liberty is, or may be, promoted by the imposition of restrictions.

In the present article, I have limited myself to that particular aspect of the relation of law to liberty which is involved in Mr. Abbott's review. I could not deal with the more general subject without saying over again what I have already said in my book. I may be allowed, however, to add that the amount of law which is demanded for the assurance of liberty increases with the growing complexity of the economic structure of society. Those who in our own time take their stand as opponents of legislative restrictions on private ownership (and on the conduct, by individuals or companies, of industrial concerns), are fighting to make Socialism inevitable. An Australian labour leader of some distinction remarked recently that he saw no reason why he should support legislation which was designed to make the system of private ownership tolerable. Personally, I am too conscious of the practical difficulties of Socialism to contemplate such an attitude with complacency. I fully recognise that the system of private ownership may prove unworkable; but if this come about, I believe that the result will be due to an opposition on the part of private owners to that measure of additional regulation which the changing conditions of our time render at once reasonable and imperative.

W. JETHRO BROWN.

ADELAIDE.